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Supreme Court of the United States

OCTOBER TERM—1945 4 – 5

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PAN AMERICAN AIRWAYS CORPORATION, PAN AMERICAN AIRWAYS, INC., and EASTERN AIR LINES, INC.,

Petitioners,

against

W. R. GRACE & CO., CIVIL AERONAUTICS BOARD, NATIONAL AIRLINES, INC., CHICAGO & SOUTHERN AIR LINES, INC., TACA, S. A., DEPARTMENT OF JUSTICE OF THE UNITED STATES OF AMERICA and PAN AMERICAN-GRACE AIRWAYS, INC.,

Respondents.

BRIEF OF W. R. GRACE & CO., RESPONDENT, IN OPPOSITION TO PETITIONS OF PAN AMERICAN AIRWAYS CORPORATION, PAN AMERICAN AIRWAYS, INC. AND EASTERN AIR LINES, INC. FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

JOHN T. CAHILL,
Attorney for W. R. Grace & Co.

FRED J. KNAUER,
JOHN P. MOORE,
Of Counsel.

June 7, 1946.

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Supreme Court of the United States

OCTOBER TERM, 1945.

Nos. 1251, 1258

PAN AMERICAN AIRWAYS CORPORATION, PAN AMERICAN AIRWAYS, INC., and EASTERN AIR LINES, INC.,

Petitioners,

against

W. R. GRACE & CO., CIVIL AERONAUTICS BOARD, NATIONAL AIRLINES, INC., CHICAGO & SOUTHERN AIR LINES, INC., TACA, S. A., DEPARTMENT OF JUSTICE OF THE UNITED STATES OF AMERICA and PAN AMERICAN-GRACE AIRWAYS, INC.,

Respondents.

BRIEF OF W. R. GRACE & CO. IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI.

Statement.

This brief is submitted in opposition to petitions for writ of certiorari to review a judgment and decree of the Circuit Court of Appeals for the Second Circuit by Judges LEARNED HAND, SWAN and FRANK, entered upon an opinion written by Judge FRANK. The decision reversed an order of the Civil Aeronautics Board which dismissed for lack of jurisdiction a proceeding concerning the extension of Panagra's route from the Panama Canal to the United States (Docket 779). The court remanded the case to the Board for further proceedings. Petitions have been filed by Pan American Airways Corporation (hereinafter called Pan American),

Pan American Airways, Inc., and Eastern Air Lines, Inc. (hereinafter called Eastern), but not by the Civil Aeronautics Board.

Panagra (Pan American-Grace Airways, Inc.) is the only American air carrier in the international field without a United States terminal. A pioneer of international aviation, it has since 1929 operated a route from the Canal Zone south along the West Coast of South America and across the Andes to Buenos Aires. The route, which commenced as a 600 mile operation between Lima and Talara in Peru, now is a trunk line of over 8,800 route miles, serving nine countries of Latin America and the Canal Zone (R. 34).*

Pan American and W. R. Grace & Co. (hereinafter called Grace) each owns 50% of its stock, and each is represented on Panagra's Board of Directors by four directors.

About 75% of the traffic which Panagra handles at the Canal originates in or is destined to the United States (R. 111). Panagra has from its inception been dependent upon a connecting service between the Canal Zone and the United States. For these reasons Grace has long sought to have Panagra's route extended from the Canal Zone to a terminal in the United States (B. R. 1196-7).

Pan American's 100% owned subsidiary, Pan American Airways, Inc., operates this connecting service. It has enjoyed a monopoly of the traffic between the United States and the Canal Zone, by virtue of its route between Miami and the Canal Zone, as well as routes between the United

* For convenience we have adopted the petitioners' method of referring to the printed record on petitions for certiorari as (R. —), to the complete record before the Civil Aeronautics Board as (B. R. —) and to Pan American's Appendix II to its Petition and Brief as (App. II —).

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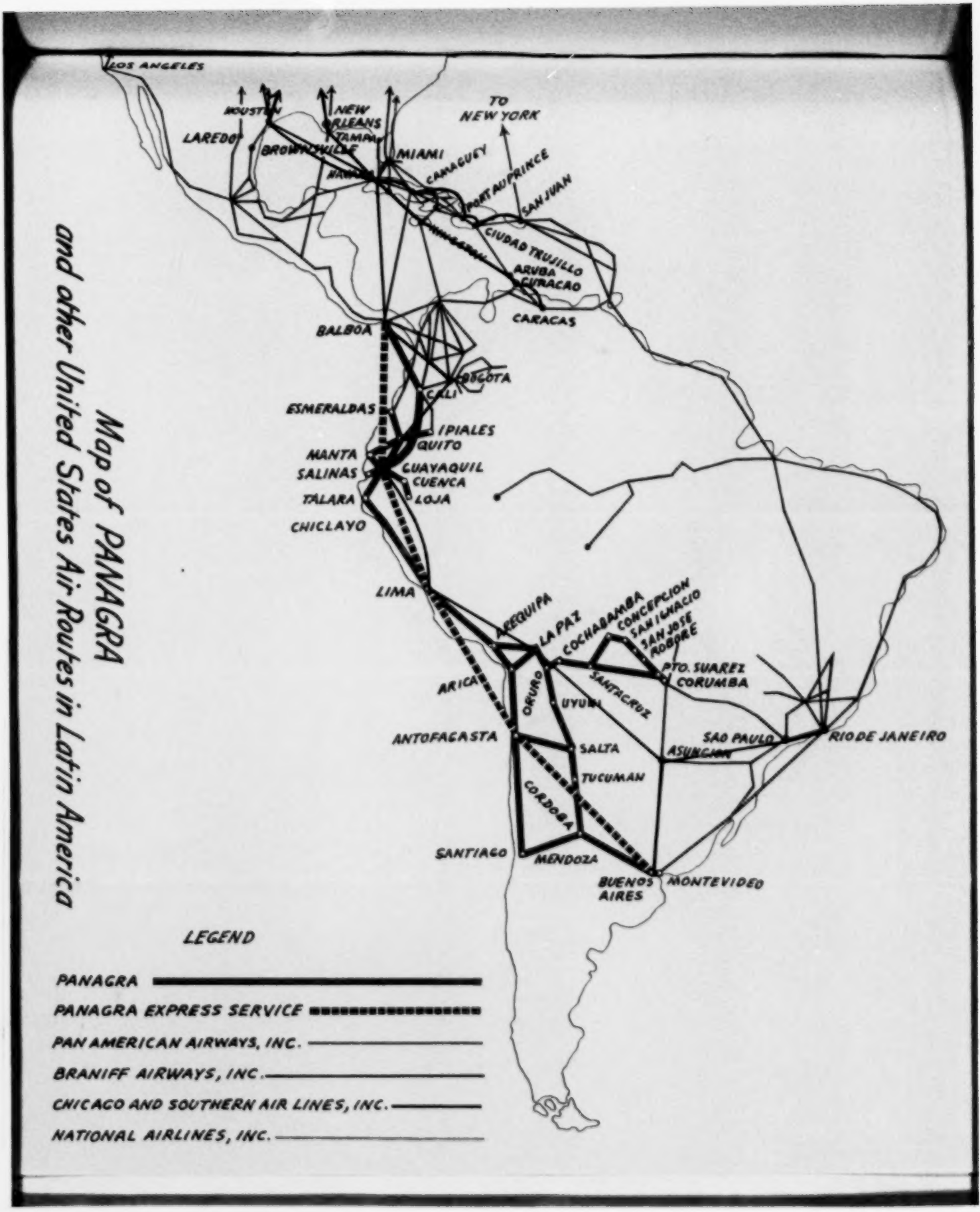

States and the Canal Zone via Central America (B. R. 6772-6).

Further, Pan American Airways, Inc. also has a route between the United States and Buenos Aires via the *East* Coast of South America (see map attached). Pan American has been able to suppress the full development of Panagra's competition to Buenos Aires (via the *West* Coast) by keeping Panagra dependent for its connections with the United States upon a connecting service to the Canal. At best a connecting service is a poor substitute for a through service—when operated by one's competitor it is well below that.

All attempts to have Panagra file an application with the Civil Aeronautics Board for an extension of its route to a United States terminal have been blocked by Pan American. *Acting upon express instructions of Pan American,* admittedly motivated by its self-interest in preventing competition by Panagra (*infra,* pp. 8-9), Pan American's representatives on Panagra's Board of Directors successfully stymied all proposals to have Panagra apply, even absenting themselves from meetings of Panagra's Board of Directors called to consider such an application (R. 149-152).

In the meantime, Pan American has continued greatly to expand its own routes, and has sought United States terminals for its various affiliates—except Panagra (B. R. 278).*

Because of this situation, Grace finally filed a petition with the Civil Aeronautics Board in December, 1941 (Docket

* Dockets 800 and 1992, applications of *Compania Mexicana de Aviacion, S. A.,* for service from Mexico to points in Texas, filed Oct. 13, 1942 and Aug. 6, 1945; Docket 841, application of *Panair do Brasil, S. A.,* to operate from Brazil to Miami, filed Feb. 1, 1943; Docket 1887, application of *Compania Cubana de Aviacion, S. A.,* to operate from Cuba to Miami, foreign air carrier permit granted March 15, 1946, C. A. B. Order Serial No. 4633.

707).* This brought the matter to the Board's attention by requesting that it extend Panagra's route to the United States (App. II, 351-371).

Following the entry of the United States into the war, the effect on the public interest by the enforced throttling of Panagra at the Canal became even more serious.† Grace filed a further petition with the Board on April 27, 1942 (Docket 744). It requested an order by the Board, pursuant to §§ 18 and 21 of the Clayton Act and § 411 of the Civil Aeronautics Act, directing that Pan American cease and desist from its unfair practices in opposing the filing of an extension application by Panagra, and it further requested an order that Pan American divest itself of its ownership of Panagra stock "to such extent as may be necessary to divest itself of its present negative control of Pan American-Grace Airways" (App. II, 372-393).

After Pearl Harbor, the Board suspended action on all proceedings involving additional air service. However, in September, 1942, the Board, after referring to Grace's petitions and the charges made therein, instituted this proceeding (Docket 779) to investigate whether the public convenience and necessity required the extension of Panagra's route to a terminal in the United States (R. 50-2, 53-5). Panagra, Grace and Pan American Airways, Inc. were made parties to this proceeding. Shortly thereafter, Pan American Airways Corporation was permitted to inter-

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* Pan American's petition (p. 5) insinuates that there was something improper about Grace placing the matter before the appropriate administrative agency, created with full authority under the Act for precisely this purpose, "Instead of going to arbitration or resorting to the courts * * *". At every stage of this controversy Grace has been met with contentions by Pan American that some other place, time or type of proceeding is more appropriate for a determination of this matter.

† Cf. *Caribbean Investigation*, 4 C. A. B. 199 (1943).

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vene, as were Eastern Air Lines and others (B. R. 112-114, 193-5).

There were six weeks of exhaustive hearings before the Examiners, covering all controversies between Pan American and Grace concerning Panagra (*infra*, pp. 26-28, and Appendix A). Thereafter the Board, on motion of Pan American, dismissed the proceeding for lack of jurisdiction (R. 31-47). This was on the ground that it did not have the power to *compel* this extension of Panagra, which, having itself filed no application, was regarded as not "willing".

Acting upon a petition to review filed by Grace, the Circuit Court of Appeals for the Second Circuit unanimously reversed that determination, and remanded the case to the Board for further proceedings (154 F. (2d) 271; R. 433-4). The court held that it was within the power, as well as the duty, of the Board to determine whether the action of Pan American in continually blocking the filing of an application by Panagra amounted to "fraud" or "illegality". If so, then the action of Pan American's representatives on the Panagra Board of Directors was to be disregarded, and Panagra was not to be considered as unwilling. Panagra would then be in the position of consenting to an extension, which the court held to be the legal equivalent of an application by Panagra (R. 368-374).

That is the decision sought to be reviewed.* It is one against fraud and illegality. If the Board finds that Pan American has been guilty thereof, Pan American is no longer to be permitted to profit by its own wrong.

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* Pan American erroneously transforms the Circuit Court's *arguendo* assumption of the correctness of the Board's decision on the question of compulsory extension (R. 369) into an actual decision by that court affirming the Board on that point (Pan Am. pet., p. 8).

The court's decision is intermediate, not final. It does not prejudge the questions of fraud or illegality. The proceeding is remanded to the Board to determine that issue. If Pan American can there demonstrate that its actions do not amount to fraud or illegality, then this Court need never be troubled with this case.

These petitions for certiorari are at least premature, when the administrative process has not yet been exhausted and no final judgment has been achieved.

In *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U. S. 251, 258 (1916), this Court, in explaining its denial of certiorari at an earlier stage of the litigation, stated:

> "And, except in extraordinary cases, the writ is not issued until final decree. * * * *The decree* that was sought to be reviewed by certiorari at complainant's instance *was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application;* * * *"*†

Cf. *American Construction Co.* v. *Jacksonville Railway*, 148 U. S. 372, 384 (1893).

The real question presented by these petitions is: at this intermediate stage of the proceedings, should this Court upset the unanimous determination of the Circuit Court of Appeals that the Board had the power and the duty to determine whether Panagra's failure to apply for the extension was due to illegality or fraud on the part of Pan American, and, if it so found, to regard Panagra as consenting to an extension of its route to a United States terminal, made in the public interest.

That the public interest, which is the foundation of the entire Civil Aeronautics Act (see particularly § 2 thereof), requires the extension of Panagra's West Coast route to

† Emphasis ours throughout.

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the United States is now beyond argument. The Civil Aeronautics Board * has expressed this in clear terms as recently as May 22, 1946 in the opinion in the Latin American case (Docket 525 *et al.*, C. A. B. Order Serial No. 4793), as follows:

> "In addition, we have long recognized the desirability of an application to the Board which would permit a determination of the question of extending Pan American-Grace Airways from its present terminal at Balboa to a point in the United States. If such an extension were made to Miami or New York, or some other point on the eastern seaboard, the eastern part of the country would be afforded a fast direct service to the west coast of South America and to Buenos Aires.
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> • • • • • • • • • •
>
> "In view of the facts above outlined we feel that the joint owners should in the public interest cooperatively enable Panagra to apply for access to the east coast of the United States" (pp. 63-4).

Grace respectfully stresses the urgency of an expeditious disposition of these petitions. Panagra has already been unduly prejudiced and injured as a result of Pan American's negative control. Further delay will, as the court below pointed out (R. 372), exclude Panagra from full participation in the rapidly developing field of international aviation, and may even doom it to extinction because of its inability to compete successfully with other American and foreign lines, which have the tremendous advantage of operating from United States terminals (see *infra*, pp. 29-30).

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* Under § 801 of the Civil Aeronautics Act the President has the final determination as to the issuance, denial and amendment of, and the terms and conditions in, any certificate authorizing an air carrier to engage in transportation outside of the United States. It has been held that his determination comes within the scope of Executive discretion and is not subject to review by the courts. *Pan American Airways* v. *Civil Aeronautics Board*, 121 F. (2d) 810 (C. C. A. 2d, 1941).

Prior Proceedings.

A. Background of the Institution of Docket 779.

Pan American has had a choice monopoly in the Florida-Canal Zone sector. Pan American has opposed Panagra's coming through to the United States for that reason.

The minutes of the Board of Directors of Pan American Airways, Inc. for December 28, 1938 state:

> "Mr. Trippe reported to the meeting on the status of negotiations with W. R. Grace & Co. It was the sense of the meeting that *it would not be in the interest of our stockholders* [Pan American Airways Corporation] for our directors to authorize an application by Pan American-Grace Airways, Inc. to extend north of Cristobal in competition with Pan American Airways, Inc." (R. 152).

This being the fact, we ignore the attempted justification advanced by Pan American, in its theory of a supposed dedication of capital by Panagra's stockholders to an enterprise forever limited to the West Coast of South America (Pan Am. pet., pp. 3-4). Irrelevant to the decision as to the extent of the Board's jurisdiction, it is obviously mentioned at this stage merely to divert attention from the crucial issue: Pan American's blocking of Panagra in order to maintain its own monopoly.*

"Grace again raised the extension issue" (Pan Am. pet., p. 5) in 1940 when Pan American and American Export

* Suffice it to say that Panagra's certificate of incorporation, permitting it to operate aircraft "as, when and where lawful," and to conduct its business in "the United States of America and in any or all foreign countries" (R. 153, 159) states its purposes and powers in the broadest possible terms, and is not to be negated by the provisions of any letter written during the course of preliminary negotiations prior to the formation of Panagra, and the terms of which were never followed (B. R. 1432-43).

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filed applications for a route between New Orleans and the Canal Zone.* Grace then urged Pan American to permit Panagra to apply for that route to give it a United States terminal (R. 149-51).

Pan American resisted all attempts by Grace to have this matter considered by the Board of Panagra (B. R. 4321-4347).

The minutes of Pan American's Executive Committee for January 14, 1941 contain a resolution:

> "* * * that the representatives of the Corporation upon the Board of Directors of Pan American-Grace Airways, Inc. should not attend the meeting of such Board of Directors called for the afternoon of January 14, 1941, to act upon such proposal [that Panagra apply for the U. S. terminal], or any adjournment thereof, and, except upon further instructions from the Executive Committee or the Board of Directors, *should not attend any other meeting of the Board of Directors of Pan American-Grace Airways, Inc. at which action is to be taken upon the subject matter above described*" (R. 150).†

Pan American excused that absence from the directors' meeting on the ground that this was really a question for the stockholders (B. R. 4323). Pan American then absented itself from the stockholders' meeting which it had caused to be called for the very purpose of considering the question (B. R. 4325).

When, therefore, Grace resorted to the filing of its petitions with the Civil Aeronautics Board in December, 1941 (Docket 707) and in April, 1942 (Docket 744), it was the

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* Pan American was later awarded this route. *Pan American Airways, et al., New Orleans-Guatemala.* 4 C. A. B. 161 (1943).

† These instructions of the Executive Committee, and a similar previous stand by Pan American's Board, were reaffirmed by Pan American's Board of Directors on July 1, 1941 (R. 150-151).

only alternative. Efforts by the Grace directors in all other directions had failed * (B. R. 3627-37).

B. Proceedings in the Panagra Terminal Investigation—Docket 779.

The Board's order of September 10, 1942 instituting this proceeding (Docket 779) on its own initiative refers to allegations in Grace's petitions in Dockets 707 and 744, and finds its action necessary in order to perform its duties under the Civil Aeronautics Act.† The order was stated to be pursuant to Titles II, IV and X of the Act, particularly § 401(h) (R. 52).‡

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* Another diversion advanced in Pan American's petition (p. 5) is that offers of arbitration under the 1939 agreement were spurned by Grace. In November, 1941, Grace met this charge by Pan American in a written statement (B. R. 7174-5), in which it was said:

> "* * * we would call your attention to the fact that the agreement specifically provides that the questions to be arbitrated are those 'which cannot be settled by the Board of Panagra.' The action of your representatives who are directors of Panagra in refusing to attend meetings of Panagra called for the purpose of discussing the questions at issue has made impossible even an attempt by the Board of Panagra to dispose of these questions as directors of Panagra acting under their full legal responsibility as such and has thereby eliminated these questions from the arbitration clause of the agreement."

† The inter-relationship of Docket 779 with the prior petitions in Dockets 707 and 744 is developed in more detail, *infra*, pp. 26-28 and Appendix A.

‡ Title IV includes § 411. Title X contains § 1002 which, in subdivisions (a), (b) and (c), gives the Board the broadest possible power to investigate any complaint whatsoever, both with respect to any acts done, and to those omitted to be done, by any person in contravention of any provision of the Act. It also confers duties upon the Board to investigate the matters complained of. When the Board finds that any person has failed to comply with any provision of the Act or requirement established pursuant thereto, the Board *shall* issue an appropriate order to compel such person to comply therewith.

Title II of the Act includes § 205(a), which empowers the Board to perform such acts, conduct such investigations, issue such orders, and make such rules as it shall deem necessary to carry out the provisions of the Act and to perform its duties thereunder.

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In six weeks of hearings before the Board's Examiners in September and October of 1943, testimony in excess of 3,400 pages was compiled. Approximately 500 exhibits, many of them voluminous, were received.

Panagra was relegated to what might be called a position of neutrality. The Pan American representatives on Panagra's Board blocked the employment of independent counsel to represent Panagra, by insisting that counsel be approved only for the limited purpose of making available all required information, and not for the purpose of taking any position on the merits (R. 122-141). Thereafter Panagra was theoretically represented by one Grace and one Pan American representative on the Panagra Board. It took no active part in the proceedings.

That Panagra was not, however, the completely disembodied spirit which Pan American would have it, was apparent from the fact that all of its executives directly engaged in the conduct of its operations, including its president, two vice-presidents and traffic representative, testified strongly in favor of the extension (B. R. 386-7, 521-2, 802, 1154-6),* as did the four Panagra directors nominated by Grace.

At the close of the hearings Pan American renewed its previous motion to dismiss the proceeding on the ground that § 401(h) did not "authorize the Board to require a carrier to operate in a different territory from that specified in its certificate" (R. 60).

Grace's cross-motion (R. 66-9), requesting that argument on the jurisdictional question be deferred until final argument on the merits, was denied by the Board (R. 49).

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* Pan American prevented these witnesses from testifying as Panagra officials, but they testified as individuals (B. R. 358-9, 512-13, 521-2, 860).

Oral argument on the motion to dismiss was heard on January 31, 1944 (B. R. 8406-8577), and on May 24th the Board issued its opinion and order granting Pan American's motion and dismissing the proceeding (R. 31-47).

Grace filed a petition for reargument and reconsideration on June 22, 1944, urging that the Board's action was erroneous, and requesting the Board to withdraw its order and remand the case to the Examiners for a report on the facts (R. 84-106). Grace's petition for reargument was denied without opinion by order of the Board dated August 5, 1944 (R. 48). These two orders, as well as the order denying Grace's cross-motion above mentioned, were the orders brought before the Circuit Court of Appeals by Grace's petition to review (R. 164-176).

C. Decision of the Civil Aeronautics Board.

Pan American's motion was, in effect, a demurrer raising the issue whether § 401(h) authorized the Board *in any case* ever "to require a carrier to operate in a different territory from that specified in its certificate" (R. 60; see App. II, 161-7). This issue was resolved in the affirmative by the Board's holding that:

> "• • • this section of the Act *does* authorize the Board to add new points or services to the certificate of a carrier on the Board's own initiative and without an application by, and the consent of the carrier;" (R. 38).

The Board went on to state that this power was not unlimited:

> "but this authority does not include the addition of new service which would be so extensive as to amount to a new air transportation route, or of such a kind to substantially change the character of a carrier's system" (R. 38-9).

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It adopted, at least in theory, as the test of the extent of its power to compel extensions under §401(h), the conclusion of Justices CARDOZO, BRANDEIS and STONE in *Interstate Commerce Commission* v. *Oregon-Washington Railway & Navigation Co.*, 288 U. S. 14 (1933), that each situation was to be tested by the standard of reasonableness under the circumstances.*

The Board had thus answered the "pure question of law" presented by Pan American's motion to dismiss.† However, it went on in the same decision to give judgment on the facts that this *particular* extension was beyond its jurisdiction, although the facts concerning this particular extension had never been briefed or argued before it, nor had there been an Examiners' report thereon.

The Board's decision was that the proposed extension was not "an alteration, amendment or modification of its certificate within the meaning of §401(h) of the Act in the sense that the Board could compel such an extension in the absence of an application from Panagra" (R. 47). The Board held that this extension would transform Panagra's character (R. 46-7). The three reasons assigned for this conclusion were that the extension would:

(1) give Panagra direct access to the traffic gateways of the United States, instead of relying on a connecting service;

(2) add some 1200 miles to Panagra's 8800 route miles; and

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* Actually it did not *apply* that test here, because a determination of the issue of reasonableness would have required an argument on and consideration of all the facts, which the Board never gave.

† Pan American's counsel so characterized the question in his argument before the Board (R. 80).

(3) require additional capital investment by Panagra of about $800,000, compared with Panagra's gross assets at the end of 1942 of $10,700,000 and its net worth at that time, exclusive of good will, of over $3,000,000.

The errors in this conclusion were discussed in Grace's briefs before the Circuit Court of Appeals to which reference is here made (App. II, 149-58).

D. Rulings and Opinions by the Circuit Court of Appeals.

Grace's petition to review was filed with the Circuit Court of Appeals for the Second Circuit on October 3, 1944, under § 1006 of the Civil Aeronautics Act (R. 164-176). The petition objected to the Board's conclusion that it had no jurisdiction in the premises (R. 172-5).

On June 4, 1945, the court, Judges L. HAND, A. N. HAND and FRANK sitting, denied motions, argued by the Board, Pan American and Eastern, to dismiss the petition or affirm forthwith the Board's orders (R. 23). The grounds of the motions were that Grace did not have a "substantial interest" in the orders complained of, as required by § 1006 (a) of the Civil Aeronautics Act, and that the Board's orders herein were not subject to review.

After the completion of oral argument on the merits of Grace's petition to review, supplemental briefs were filed on December 10, 1945, at the court's request (App. II, 325-482). Thereafter Grace and Pan American each filed a reply letter (App. II, 483-9).

The opinion of the Circuit Court of Appeals, rendered January 28, 1946 (R. 351-79), summarized *supra*, p. 5, reversed the Board's order and remanded the case to the Board for further proceedings. 154 F. (2d) 271.

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Pan American and Eastern, but not the Civil Aeronautics Board, thereafter filed petitions for rehearing in the Circuit Court of Appeals on February 11, 1946 (R. 380-426), arguing *in extenso* the same contentions now raised by them in this Court. Those petitions were denied, the court filing a further opinion, dated February 21, 1946 (R. 427-32), which rejected those contentions and amplified the original opinion, emphasizing once again the public interest involved.

Only Pan American, Pan American Airways, Inc. and Eastern have filed petitions for a writ of certiorari.

SUMMARY OF ARGUMENT.

I.

The Circuit Court of Appeals correctly decided that the Board had the power and the duty to determine whether Panagra's failure to apply for the extension was caused by fraud or illegality of Pan American; and if so, to regard Grace as speaking for Panagra, thus making the proposed extension one to which Panagra consents.

II.

The Circuit Court of Appeals correctly ruled that the Board should decide in Docket 779 the issue as to whether Panagra's consent is blocked by fraud or illegality of Pan American.

III.

Certiorari should not issue in this case on the basis of petitioners' claims that the Circuit Court of Appeals acted upon considerations not previously advanced.

IV.

Respondent W. R. Grace & Co. was entitled to seek review of the Board's orders and no error can be predicated upon the Circuit Court's recognition of that right.

POINT I.

The Circuit Court of Appeals correctly decided that the Board had the power and the duty to determine whether Panagra's failure to apply for the extension was caused by fraud or illegality of Pan American; and if so, to regard Grace as speaking for Panagra, thus making the proposed extension one to which Panagra consents.

The decision of the Circuit Court of Appeals was in essence a recognition of the fact that the public interest in matters arising under the Civil Aeronautics Act is paramount. The case before it was much more than a private dispute between stockholders; it was a thwarting of the vital public interest. In a practical and realistic view of the facts, the court recognized that Panagra itself could not be regarded as "unwilling". The Board erred in permitting the proceedings in Docket 779 to come to an "abortive end" *by imputing to Panagra the unwillingness of Pan American.*

The court decided that this imputation was improper if the Board should find that Pan American was acting in its *own* interest to the prejudice of Panagra, or if its activities amounted to an unfair trade practice.* If such were the

* *Pennsylvania Sugar Refining Co.* v. *American Sugar Refining Co.*, 166 Fed. 254 (C. C. A. 2d, 1908), holds that the Sherman Act prohibits one corporation from utilizing its voting interest in another in such a way as to prevent the latter from engaging in a business which would compete with the former. See also *Baush Machine Tool Co.* v. *Aluminum Co.*, 72 F. (2d) 236 (C. C. A. 2d, 1934), cert. den. 293 U. S. 589. Other cases bearing on the situation where the activities of a corporation are restrained by a controlling stockholder in the latter's own interest as a competitor include *Blaustein* v. *Pan American Petroleum & Transport Corp.*, 293 N. Y. 281 (1944); and *Singer* v. *Carlisle*, 26 N. Y. S. (2d) 172 (Sup. Ct. N. Y. Co., 1940), aff'd 261 App. Div. 897 (1st Dept., 1941); app. den. 285 N. Y. 863 (1941).

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case, the court said, the Board should disregard the effect of Pan American's conduct and treat Panagra as consenting to the extension.*

The Circuit Court of Appeals correctly held that a consent by a carrier to a § 401(h) extension proceeding begun by the Board is the legal equivalent of a petition for the same extension initiated by the carrier (R. 431). This has been the position taken by the Board itself.† Eastern but obfuscates the issue by inquiring what Grace has filed which must be considered an "application" on behalf of Panagra.

The public interest, we believe, is not to be frustrated by the improper and illegal conduct of a 50% stockholder in blocking a formal application by an air carrier, which would permit the Board to pass upon the merits of the extension. Pan American, however, in effect pleads for the ability to thwart the Act in this manner with complete immunity from the Board's jurisdiction (cf. pet., p. 23).

Petitioners argue that the Circuit Court misapprehended this Court's opinion in the cases of *American Power & Light Company* v. *Securities and Exchange Commission*, and *S. E. C.* v. *Okin*, 325 U. S. 385 (1945), particularly that part of it which dealt with Okin's appeal. There, the owner

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* The Board is not, as Pan American states, "to sit in judgment as to whether Pan American is entitled to act on its belief that from the standpoint of 'the joint interest' the extension would be a mistake * * *" (Pan. Am. pet., p. 23). The Board will consider whether there was not a complete absence of any such *bona fide* belief by Pan American.

† In at least two cases which the Board had begun on its own initiative pursuant to § 401(h), the addition to the carrier's route was granted, following the express or implied consent to the proposed route by the carrier during the course of the proceeding. *Pennsylvania Central Airlines—Temporary Service to Huntsville, Ala.*, 3 C. A. B. 305 (1942); *Pennsylvania Central Airlines Tri-Cities Service*, 2 C. A. B. 524 (1941).

of 9,000 shares, out of a total of 5,000,000 shares, of common stock of Electric Bond & Share Co. sought review of an order of the Securities and Exchange Commission under the Public Utility Holding Company Act, approving the refinancing of a loan made by Electric Bond & Share to a subsidiary.

The stockholder attacked the transaction on the ground that it was both illegal and fraudulent. As the corporation took a position adverse to him, his application for relief, this Court pointed out, was "in the nature of a derivative or stockholder's action" (p. 392). A demand upon the corporation would have been futile. A majority of this Court upheld the standing of Okin to initiate the review. No circuitous route of requiring a separate prior stockholder's suit, as Pan American here suggests, was held necessary.

The holding in the *Okin* case was applied by the Circuit Court of Appeals to this controversy. Here Grace, a 50% stockholder, is asserting that Pan American, the other 50% stockholder, has used and is using the jointly owned company for its own purposes, to the detriment of Panagra; Grace also charges that Pan American has thus engaged in unfair trade practices in contravention of the Act, and the antitrust laws, and in defiance of the public interest.

In the instant case, the corporation—Panagra—unlike the carrier in *Pittsburgh & West Virginia Railway* v. *United States*, 281 U. S. 478 (1930); or in *Schenley Distillers Corporation* v. *United States**, 326 U.S.—, 66 S. Ct.

* This case is not at all in point. As the 100% subsidiary of Schenley Distillers Corporation was prosecuting a suit to set aside the order of the I. C. C., there was no need for the parent company also to secure a review of the same order, it being adequately represented by the 100% subsidiary which it controlled. It therefore had no grievance.

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247 (1946); and unlike the subsidiary company in the *Okin* case, has not had an opportunity even to take a position before the administrative tribunal.

Had Panagra been able to make application to the Board, placing before that tribunal the question as to whether the public interest required its extension, then it might well be that one of Panagra's stockholders should not be permitted to maintain an *additional* separate proceeding. But that is certainly not our situation. This crucial distinction vitiates petitioners' entire argument as to the supposed conflict of the decision of the Circuit Court of Appeals with the decision of this Court in the *Pittsburgh* case.

The inapplicability of the *Pittsburgh* case results from the fact that there *the merits of the dispute had been before the administrative body*, and had been determined according to the public interest. The Interstate Commerce Commission had found that the public convenience would be served by the application in question. In that situation there was no need to permit a minority stockholder to maintain a separate proceeding—there was no question as to any blocking of the public interest through the inability of the administrative tribunal to pass upon the substantive issues.

In our case the action by Grace was necessary and indispensable, not in order to force its view of the merits upon the Board, but in order to get the case before the Board at all for its determination.

Furthermore, in the *Pittsburgh* case the *primary* relief sought by the petitioning stockholder was a determination of the intracorporate conflict presented, because the Commission had already determined the requirements of the public interest as to the merits of the applications. In the

instant case Grace does not seek the determination of an intracorporate dispute as such, but only to the extent that the existence of that "intracorporate dispute" prevents the placing before the Board of an application by Panagra, which would permit the Board to exercise its function of determining whether the public interest requires such an extension.

Eastern admits that the *Okin* case permits a stockholder to maintain a proceeding where he can prove he has a special interest or that something alleged to be actively detrimental to the corporation is about to be done (pet., p. 34). Yet it repeats platitudes that a stockholder in the same position as any other stockholder may not speak for the corporation in attacking an administrative order (pet., p. 33).

The usual case involves the interest of one stockholder, out of many, holding a small percentage of his corporation's stock.*

But here the interest of Grace is not at all the same as the interest of "any other stockholder". The interests of the only two stockholders are diametrically opposed. Grace is in a position to suffer special financial damage by virtue of the failure to secure an extension of Panagra's route (B. R. 802, 4909). The only other stockholder, Pan American, actually benefits from its own wrong in blocking Panagra's extension, through the improvement of its own relative competitive position. Petitioners' theoretical and

* For example, from an inspection of the record in the *Pittsburgh* case, it appears that Pittsburgh owned only approximately 12% of the total stock outstanding (67,400 shares out of a total of 558,700) and owned *none* of the prior lien stock which, by reason of a default in dividends, had actual control of the corporation at and prior to the commencement of the proceeding. Pittsburgh and the other stockholders similarly situated were able to elect only three out of a total board of fifteen directors (*Pittsburgh* Record, pp. 3-4, 18).

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finespun legalisms completely ignore the peculiar facts of this case, which present a situation demanding realistic, practical relief.

Petitioner's cases are, therefore, obviously not authority for the proposition urged by them—that an administrative agency, charged with the enforcement of the public interest, is precluded from considering even those intra-corporate disputes which have the effect of obstructing any action by the Board in carrying out its duties pursuant to the declared policy of the Act. None of petitioners' cases involved a corporation *unable to act on its own behalf.* There is no reason why the *Pittsburgh* case should be extended beyond its facts, as petitioners would have it, to this wholly dissimilar situation.

The *per curiam* opinion on rehearing serves further to emphasize the fact that the Circuit Court of Appeals acted in accordance with other decisions of this Court, requiring a careful consideration of the public interest involved.*

Expressly noted in that opinion was the language of this Court in *Scripps-Howard Radio* v. *F. C. C.*, 316 U. S. 4, 14-15 (1942):

> "That a court is called upon to enforce public rights and not the interests of private property does not diminish its power to protect such rights.* * * Courts no less than administrative bodies are agencies of

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* *F. C. C.* v. *Sanders Radio Station*, 309 U. S. 470 (1940); *Scripps-Howard Radio* v. *F. C. C.*, 316 U. S. 4 (1942); *F. C. C.* v. *National Broadcasting Company*, 319 U. S. 239 (1943); *Ashbacker Radio Corp.* v. *F. C. C.*, 326 U. S. —, 66 S. Ct. 148 (1945).

The public interest is defined in § 2 (c) and (d) of the Act to preclude "unfair or destructive competitive practices", and to include "Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;" (See Appendix B hereto).

government. Both are instruments for realizing public purposes" (R. 429).

The Circuit Court pointed to the "numerous provisions" of the Civil Aeronautics Act vesting the Board with plenary powers to safeguard the public interest by giving it practically complete control over the management of air carriers.*

There is no merit in the argument that the decision in the instant case implies that any stockholder may bring any intracorporate dispute before some administrative agency (Pan. Am. pet., p. 23).† Our contention is not that the Civil Aeronautics Board (or any administrative agency) must determine *every* intracorporate dispute which may arise within a corporation subject to its jurisdiction. But it *is* our contention that when fraud or illegality defeat the public interest, by preventing the Board from determining the merits of a vital question which would otherwise be before it for decision, the Board has the power and the duty to resolve such an issue. Because of its effect upon the public interest, it can then no longer be regarded as a "mere intracorporate dispute."

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* Citing specifically §§ 407, 408, 409, 411, 412, 413, 415.

† Ignoring the unusual fact situation here, petitioners predict an overwhelming of the Board with intracorporate disputes (Eastern pet., p. 36, Pan Am. pet., p. 23). A similar technique was used to oppose Grace's right to secure a review. Although this was only the third review of an order of the Board since its creation in 1938, it was claimed that the courts would be "swamped" with litigation brought by stockholders (See *e. g.*, App. II, 97).

POINT II.

The Circuit Court of Appeals correctly ruled that the Board should decide in Docket 779 the issue as to whether Panagra's consent is blocked by fraud or illegality of Pan American.

Petitioners contend that the issue as to the fraud or illegality of Pan American's actions cannot be considered in this proceeding, Docket 779 (Pan Am. pet., pp. 31-6; Eastern pet., pp. 39-43).

The lamentation over a supposed invasion of the administrative process, and "intrusion" on the discretion of the Board, might provoke more sympathy were it the Board (apparently acquiescing in the decision) which made outcry—rather than the party whose fraud and illegality has successfully blocked the proper functioning of that very Board during all these years.

No litigant ever strove more mightily to disguise a crucial matter of substance as one of mere procedure than does Pan American here. But the court's decision is not on a point of procedure. There is a vast difference between a question as to the order in which respective applications shall be heard, and a question whether one party shall be permitted to exert its power to prevent an application from ever being filed before the administrative Board at all.

For this reason the case of *F. C. C.* v. *Pottsville Broadcasting Company*, 309 U. S. 134 (1940), which petitioners urge, is entirely inapplicable to the situation in Docket 779, where the Board did not exercise jurisdiction, and thus

never considered at all the question of public convenience and necessity therein presented.

The court's remand is clearly within the power expressly conferred upon it by § 1006(d) of the Civil Aeronautics Act, to order further proceedings by the Board. To the Board, the court left the function of determining the facts as to Pan American's actions—which the court expressly refused to prejudge *—as well as the discretion as to the need for further hearings and other procedural matters. Consequently there is no intrusion upon the administrative process. This decision increases, not diminishes, the Board's powers and jurisdiction.

Pan American states that the Board's procedure prejudiced no right of Grace (pet. pp. 35-6). The combination of the Board's decision in Docket 779, and its failure ever to act upon the petition Grace filed in April, 1942 in Docket 744, apparently ended the entire controversy so far as the Board was concerned. The final statement in the Board's opinion, made after mentioning the deadlock between Pan American and Grace in Panagra, to the effect that

> "*We have sought remedy under the Civil Aeronautics Act*, but after having the facts presented in extensive public hearings we must conclude that the Act does not give the Board the power to take the action contemplated by this proceeding" (R. 47)

apparently reflected a view that it had exhausted the extent of its powers under the Act to deal with the situation.

There is no justification for the impression petitioners seek to foster that there was something additional which Grace could have done to bring on action in Docket 744 upon

* R. 372, 431.

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its charges against Pan American (Pan Am. pet., p. 32; Eastern pet., p. 35).*

The Board made no actual determination that those issues of Pan American's fraud or illegality should be considered in a separate proceeding, as Pan American's brief (pp. 31-3) implies. As the court below pointed out, "* * * it does not appear that, if the Board had believed the power to exist, it would have refused to press the proceeding to a conclusion; * * *" (R. 372).

Inasmuch as the Board has the power to decide the issue, and in view of the peculiar circumstances of this case, the Circuit Court of Appeals correctly held that "to frustrate the whole undertaking when it lay ripe for final conclusion was, we think, beyond even that generous latitude which must be accorded to the Board's discretion."

Pan American's contention that the question of its fraud or illegality can be considered only in some other proceed-

* Grace brought the subject of Pan American's action blocking Panagra directly before the Board as early as December of 1941, when it filed Docket 707. It reiterated its protests even more strenuously in filing its petition in 744 in April, 1942. From the moment that the Board instituted this proceeding, Docket 779, Grace has espoused the cause of Panagra's extension therein and battled against Pan American's blocking of this extension at every stage of this proceeding, and with all possible vigor. Through six weeks of trial of the case Grace put in all the evidence in favor of the extension, and also showing the fraudulent and illegal actions of Pan American. It was Grace which opposed Pan American's motion to dismiss the proceeding for lack of jurisdiction, and thereafter sought reargument; Grace took the case to the Circuit Court of Appeals to secure a reversal of the Board's dismissal; it was Grace which intervened in the Latin American case (Docket 525), again to press the cause of Panagra's extension. It is Grace which now in this Court is still the party espousing the extension, still pointing to Pan American's fraud and illegality, while Pan American continues to resist the extension by every means at its disposal.

The unremitting fight that Grace has fought step by step, and day by day, for over five years demolishes any implication that Grace has permitted its objection to Pan American's action to lapse.

ing is but another outgrowth of its perennial defense that this controversy is more properly to be considered in some other forum, or in some other proceeding, or on some other theory.*

No separate proceeding is needed because the complete evidence on all phases of this controversy concerning the unlawfulness of Pan American's conduct was put into *this* record in the course of the extensive hearings.

The record in this 779 proceeding is the best proof. Although peppered with assertions that the issues in Docket 744 were not being tried, the transcript of the hearing shows that mere lip service was paid to that principle.† The actuality is that objections to evidence concerned with 744 were always overruled (*e. g.* B. R. 1362-8).

Everything went in.‡

Indeed, as the hearing developed further, even the Examiners, *non constat* their former statements, recognized

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* It never tires of contending to Grace that there are "other and more suitable paths for asserting its claims" (Pan Am. pet., p. 40), all the while blocking every path which Grace takes.

† When the order instituting 779 came down, Grace believed its petitions in 707 and 744 had achieved their principal purpose. In that belief, and correctly anticipating that Pan American would seek to obscure the public interest requiring Panagra's extension, Grace was insistent that in 779 the only question remaining was the public convenience and necessity for the extension. Pan American, on the other hand, insisted that many other considerations were involved, including those raised in the pleadings in Docket 744 (B. R. 54, 131-2, 1753; App. II, 234). Pan American's view prevailed.

‡ The single instance in the entire six weeks' trial of exclusion of something relevant to 744 was the Examiner's refusal of Pan American's request to mark in evidence Grace's petition in Docket 744. The exclusion was based on the sole and express ground that the complaint in 744 was a formal public document already on file with the Board, to which Pan American's counsel was free to refer in his brief and argument (B. R. 1368).

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its broader scope. Then they overruled objections to new lines of inquiry with such statements as:

> "Examiner Brown: Mr. Cahill, we have got to make it clear that we have got a very wide investigation. In the exhibits that have been submitted not only by Pan American but also by Grace and by Panagra, we have gone into details concerning the organization and development of this company back from the days of its early inception. We have gone into matters of the minutest detail, concerning the operations and the conflict of interests which have arisen, and we have gotten into questions concerning control under Section 408 of the Act, and while I agree that this investigation was for the purpose of determining whether or not Panagra should be extended from the Canal Zone to the United States, *those issues are in here and we might just as well face it, and that is what we are going to have to hear*" (B. R. 1890).

As the Board's counsel remarked:

> "• • • we are getting so far away from our convenience and necessity • • • that we don't even recognize [a question of convenience and necessity] when we see it" (B. R. 1417).

These additional subjects having thus been opened up, Grace naturally had to put in its evidence relating to points beyond the scope of a mere convenience and necessity case.

Consequently, by the end of the hearing, the greater portion of the record, which covered the entire history of Panagra, involved evidence relevant more to the complaint in Docket 744 than to the limited issue of public convenience and necessity. *This hearing covered every point raised in*

*Grace's petition in Docket 744, as well as Pan American's countercharges therein.**

Eloquent proof attesting that fact is submitted in a tabulation of some of the subjects tried in the hearings in this case, set forth in Appendix A to this brief. Furthermore, Pan American fails to suggest an iota of additional evidence which it has not already produced in this case bearing on the question of its own acts and motives.

Small wonder then that the court below characterized as "futile and dilatory" a course which would require one or more separate proceedings to determine the questions of the illegality of Pan American's actions and the extension of Panagra. This, the court pointed out, was to be avoided unless compelled by a defect of power not existent here.†

Likewise, the reasons expressed by the Circuit Court of Appeals, and ordinary common sense—having regard to practicalities rather than to formalism—amply support the court's rejection of Pan American's suggestion that Grace

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* At an earlier stage of the case, Pan American admitted the broad scope of this record:

> "The various charges *and countercharges* which occupy so many pages of the voluminous record are still more clearly irrelevant to the issue here presented for determination" (B. R. 8681).

This same statement, made in Pan American's brief before the Board on its motion to dismiss, when compared with Grace's argument to the Board concerning the alleged unwillingness of Panagra (*infra*, pp. 32-34), also answers the weak innuendo that Grace induced the Board's error of not considering the grounds stated in the court's opinion (Pan Am. pet., p. 40).

† Pan American's insistence that the Board must ignore in this proceeding the same underlying issue as to why Panagra has not applied, would compel the Board to put on "complete blinders", which this Court has held to be obviously not consistent with good sense. *United States* v. *Pierce Auto Freight Lines*, 326 U. S. —, 66 S. Ct. 687, 695 (1946).

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must travail through the labyrinth of a stockholder's suit in equity before it can—years later—present to the Board the application of Panagra.* When alternative procedures are possible the choice of forum should not be left to the wrongdoer.

The wisdom of the court in pointing out the likelihood of prejudicial effect upon Panagra of further delay is shown by subsequent events.† On May 22, 1946 the Board announced its decision in the Latin American case (Docket 525 *et al.*). A route was awarded to Braniff Airways from Houston, in the United States, via Havana, *down the West Coast of South America to La Paz and thence to Buenos Aires.* Furthermore, Braniff will have connections at Havana with National Airlines and with Chicago & Southern Air Lines, so it will offer a two carrier service from a large section of the United States to Buenos Aires via the West Coast of South America. Meanwhile, via the Panagra route this would still entail a three carrier operation: Panagra south of the Canal, Pan American between Florida and the Canal, and Eastern (or National) from Florida north (see map, *supra*).

Likewise, in the Latin American case the Board granted a route between San Juan and New York to Pan American, which enables it to offer a shorter, more direct and faster one carrier through service from New York (the principal traffic center) to Buenos Aires via its East Coast

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* Cf. *Securities and Exchange Commission* v. *Okin*, 325 U. S. 385 (1945).

† The court stated "It is not impossible that should the Board much longer delay, and then decide that the extension should be granted to Panagra, its action might be frustrated by the intervening grants of licenses to other carriers" (R. 372).

Petitioners complain that the court's footnote referred to "material not in the record." The matters referred to in Docket 525 *et al.* were matters of public record in one of the proceedings before the Civil Aeronautics Board, of which a court would normally take judicial notice.

route. Panagra, still dead-ended at the Canal without a United States terminal, must face the increased competition of these aggressive American airlines which have the advantages of United States terminals.

Under the Bilateral Air Transport Agreement between the United States and Great Britain signed at Bermuda on February 11, 1946, the British are awarded a route from London to New York and thence, via Cuba, Jamaica and Panama, down the West Coast of South America, paralleling Panagra.

Furthermore, applications for United States terminals by foreign air carriers in South America are now being considered by the Board.* The Board has recently been granting United States terminals to foreign air carriers with but little formality.†

These dynamic developments foreshadow disaster for Panagra, if the extension to the United States be not granted now. Unless this controversy be promptly determined in this proceeding, the ultimate legal victory of

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* *E. g.*, Docket 1983, Application of *Aerovias Nacionales De Colombia, S. A.*, for service from Bogota and Baranquilla, Colombia to Miami and New York; Docket 1824, Application of *Lineas Aereas Taca De Colombia, S. A.*, for service Bogota-Canal Zone-Miami-New York; Docket 774, Application of *Taca, S. A.*, for service from San Salvador to New Orleans and Miami; Docket 2180, Application of *Linea Aerea Taca de Venequela, C. A.*, for service from Venezuela to New York; Docket 2281, Application of *Linea Aeropostal Venezolana* for service from Maiquetia, Venezuela to Miami via Havana, and to Montreal via Havana and New York.

† *E. g.*, CAB Order 4482, dated Jan. 26, 1946, granting *Swedish Intercontinental Air Lines'* application in Docket 2071, for permit to operate between Stockholm and New York and Chicago; Order 4630, dated March 1, 1946, granting *Det Danske Luftfartsetskat A/S* (Danish Air Lines) a permit authorizing transportation between Copenhagen, Denmark and alternate terminal points, New York and Chicago; Order 4634, dated March 14, 1946, granting *Royal Dutch Airlines* (KLM) a permit authorizing transportation between Amsterdam, The Netherlands, and the terminal point New York, N. Y., and between the Netherlands West Indies and Miami, Florida.

Panagra will be a Pyrrhic one—with Panagra foreclosed, as a practical matter, from a route to or terminal in the United States—a possibility of which Pan American is not unaware.

Finally, Pan American asserts (pet. pp. 34-5) that if this controversy is determined in 779, and a certificate, approved by the President, is awarded to Panagra, there is doubt as to whether Pan American could then secure a judicial review of the Board's findings of fraud or illegality. But *Pan American Airways* v. *Civil Aeronautics Board*, 121 F. (2d) 810 (C. C. A. 2d, 1941), held to be beyond judicial review only those matters relating to the issuance of a certificate which fell within the scope of the discretion and final determination of the Executive, and not purely legal questions.

If a determination of Pan American's fraud or illegality is a reviewable legal question, it does not cease to be such because decided in this proceeding rather than a separate one under § 411. It is the nature of the issue, not the proceeding in which it is raised, that determines its reviewability.

POINT III.

Certiorari should not issue in this case on the basis of petitioners' claims that the Circuit Court of Appeals acted upon considerations not previously advanced.

Petitioners' contention that the court decided the case on an objection never presented to the Board, or even to the court, is not only factually incorrect, but completely misconceives the decision below. The court decided the legal question that the Board *did* have jurisdiction and power to extend Panagra's route, if Panagra's alleged un-

willingness was found to be attributable to Pan American's fraud or illegality. It left the factual issues to be decided by the Board. The issue of the Board's jurisdiction and power had been the sole issue argued before the Board. Grace's petition to review, as the court pointed out, objected to the Board's failure to take jurisdiction.

Completely without foundation is the insistence that the grounds upon which the decision is based had not previously been advanced. The very heart of this controversy since 1941 has been Grace's insistence that Panagra is unwilling only in the purely artificial sense that Pan American's conduct has prevented the carrier from itself filing an application for the extension.

Grace has pressed this point before both the Board and the court. Thus, in Grace's brief before the Board, in opposition to Pan American's motion to dismiss for lack of jurisdiction, it was stated:

> "No application for such an amendment of its certificate has been filed by Panagra for the reason that the moving party, Pan American Airways Corporation, which owns 50% of Panagra's stock, has blocked such an application.
>
> • • • • • • • • •
>
> "The opposition to the extension comes not from Panagra, but from Pan American which has consistently utilized its position as a 50% stockholder to restrain Panagra's development. The individuals who comprise the Panagra management have unanimously testified in favor of the extension, although they have been permitted to do so only in their individual capacities • • •.
>
> "Hence the position which Panagra takes with respect of the proposed amendment of its certificate is not one of hostility, but, at most, of neutrality.

At the insistence of Pan American, Panagra takes no position one way or the other on the contemplated extension (635). *Thus an underlying assumption which forms the basis of the Pan American motion to dismiss, namely, the unwillingness of the carrier, is unfounded.*

"Even though there be no application by Panagra and even if Panagra were technically 'unwilling', the Board may validly compel it to operate to a terminal in Florida" (B. R. 8587-8).

And in oral argument before the Board, counsel for Grace made the following statement:

"Now, treating of the alleged unwillingness of Panagra from the factual side, that is one of the fundamental grounds of the Pan American motion to dismiss. *Panagra is not unwilling in the sense that it is resisting this proposed amendment.* W. R. Grace & Co. owns 50 percent of the stock of Panagra, and directors representing W. R. Grace & Co.'s stock interest have urged for years, that Panagra be permitted to apply for a United States terminal.

"Now, it is true the members of the Panagra management were not allowed upon this trial to testify in their official capacity, but they were permitted to testify in their individual capacity, and they testified, to a man, in favor of the proposed extension.

"Now, Panagra, let the fact be clear, has made no application for a United States terminal, solely because its other 50 percent stockholder, Pan American Airways, has consistently refused to permit such application. Pan American, the record here discloses, even went to the extent of instructing its representatives on the Panagra Board not to attend Panagra directors' meetings. Pan American itself called a Panagra stockholders meeting to consider an application for a United States terminal, and it stayed away from that, too.

> "Now, the reason, among others, for Pan American's refusal to permit the second largest American Flag carrier abroad to come to the United States is that the extension would not be in the best interests of Pan American. *Pan American is here trying to take advantage of a situation created by its own hostility to Panagra's interests*" (B. R. 8474-5).

In various briefs before the Circuit Court, Grace pointed out in some detail the reasons why Panagra had not itself applied for a terminal in the United States (brief on motion to dismiss, App. II, 107-18, 120-23, 125-27; main brief, App. II, 142-4).

Again in Grace's reply brief in the Court of Appeals:

> "It is inequitable that W. R. Grace & Co. should be bound by Panagra's inaction, when this inaction results from a wrong on the part of a stockholder whose interests are in conflict with those of Panagra" (App. II, 316-17).

And further on the point:

> "Pan American's attempts to stifle Panagra—the so-called 'intracorporate dispute' referred to—are not only a violation by Pan American of its fiduciary duty to Panagra and to W. R. Grace & Co., but also a restraint of trade within the meaning of the antitrust acts and an unfair method of competition within the meaning of § 411 of the Civil Aeronautics Act" (Reply Brief, App. II, 313-15).

Finally, in Grace's supplemental brief in the Circuit Court of Appeals:

> "*Panagra never was unwilling.* All of its executives, directly engaged in the conduct of its opera-

tions, including its President, two Vice-Presidents and Traffic Representative, testified strongly in favor of the extension (R. 386-7, 521-2, 802, 1154-6), as did the Panagra directors nominated by Grace. The only contrary voice came from the Panagra directors representing Pan American, and inasmuch as their action is in bad faith and for ulterior purposes, legally they should not be regarded as speaking on behalf of the corporation" (App. II, 349; see also 334-350).

The issue raised by Grace's charges concerning the unfair and illegal restraints of Pan American upon Panagra has been prominent every step in these proceedings, including, in addition to those already mentioned:

Board's Order instituting Docket 779 (R. 51).

Answer of Pan American in Docket 779 (B. R. 66).

Reply of W. R. Grace & Co. to Answer of Pan American (B. R. 277-8).

Hearings before the Examiners in Docket 779. See Appendix A hereto.

Opinion of the Board (R. 35-7).

Petition of W. R. Grace & Co. for review of the Board's orders (R. 171).

Oral argument before the Circuit Court of Appeals.

But even if we assume *arguendo*, contrary to these facts, that the instant case was decided on an objection not previously advanced, the contentions of petitioners are still without merit.

When the decision of the Board was taken by Grace to the court below, the entire record was before the court.

Its power on review is stated in § 1006(d) of the Civil Aeronautics Act, which petitioners completely overlooked:

"Power of Court

"(d) Upon transmittal of the petition to the Authority, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, *to order further proceedings by the Authority.* • • •"

Petitioners' argument is that the power of the court is circumscribed in this case by the provisions of § 1006(e):

"Findings of Fact by Authority Conclusive

"(e) The findings of facts by the Authority, if supported by substantial evidence, shall be conclusive. No objection to an order of the Authority shall be considered by the court unless such objection shall have been urged before the Authority or, if it was not so urged, unless there were reasonable grounds for failure to do so."

The obvious reason for such a provision in the statute is to give the administrative body an opportunity to consider in the first instance, and to make findings of fact with respect to, questions which may be urged upon review of its orders. *Marshall Field & Co.* v. *National Labor Relations Board,* 318 U. S. 253 (1943).

The legislative policy in this respect is lucidly expressed in this Court's opinion in the case of *N. L. R. B.* v. *Cheney Calif. Lumber Co.,* 326 U. S. —, 66 S. Ct. 553, 555 (1946), as follows:

"Congress desired that all controversies of fact, and the allowable inferences from the facts, be threshed out, certainly in the first instance, before the Board. That is what the Board is for. It was

therefore not within the power of the court below to make the deletion it made."

The "deletion" referred to in the latter part of the above quotation was the striking out of a cease and desist order issued against the company by the District Court, to which no objection was made by the company until the Board sought judicial enforcement of its order. This Court held that the objection to the cease and desist order, inasmuch as it involved questions of fact concerning the history of the company's relationships with its employees, should have been presented to the Board; and that having been presented in the first instance to the District Court, the excision of the order by the District Court was reversible error.

The array of cases presented by Pan American and Eastern in support of this argument presents similar situations. Their underlying principle is that *questions of fact, or questions involving facts,* were presented to the reviewing court, which for manifest reasons should have been committed to the administrative agency in the first instance.

That this is the rationale behind the rule invoked by petitioners is further apparent from the heading of subsection 1006(e)—"Findings of Fact by Authority Conclusive" —which shows that the purpose of the rule is to assure that the administrative tribunal shall make the findings of fact.*

This rule has in no sense been violated by the decision of the Circuit Court of Appeals, for all the court has done is to remand the proceeding because of legal error by the Board as to the extent of its power. The court decided no issue of fact. Expressly disclaiming this, it remanded the

* This heading is nowhere even mentioned by petitioners in their frequent quotation of and reference to this subsection.

case, as authorized by § 1006(d), to the Board to determine the factual issues involved.

This situation is totally unlike the cases cited by petitioners, where objection is raised by a party to the consideration of a matter not previously argued, on the ground of surprise or deprivation of legal rights. There is absolutely no prejudice to petitioners. The facts are not being removed from the Board's consideration but are being placed before it.

In their anxiety to avoid the inevitable consequences of a decision on the merits on the present record, petitioners have overlooked an important doctrine, well established by decisions of this Court. Those cases hold that even where (unlike here) a decision was grounded on an objection not urged below, an overly-nice application of rules of procedure should not be insisted upon where the result would be to defeat the principles of fundamental justice. Courts have inherent power to see that justice is done.

Thus, in the case of *Hormel* v. *Helvering*, 312 U. S. 552 (1941), Mr. Justice BLACK, speaking for the Court, pointed out that:

> "Orderly rules of procedure do not require sacrifice of the rules of fundamental justice" (p. 557).

Commenting on the general rule that appellate courts will not ordinarily consider matters not raised below, he said:

> "For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine *questions of fact.* This is essential in order that parties may have the opportunity to offer all the evidence they believe rele-

vant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence * * * Recognition of this general principle has caused this Court to say on a number of occasions that the reviewing court should pass by, without decision, questions which were not urged before the Board of Tax Appeals. *But those cases do not announce an inflexible practice,* * * *" (pp. 556-7).

The opinion of this Court further stated:

"There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below. See *Blair* v. *Oesterlein Machine Co.*, 275 U. S. 220, 225.

"Rules or practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy (p. 557).

* * * * * * * * *

"Analogous in principle is the philosophy which underlies this Court's decisions with relation to appellate practices in other cases: those in which it has been held that a decision of the Board of Tax Appeals can be supported in the reviewing court on a new theory of law; *those which have been remanded because the lower courts failed to give consideration to*

> *a phase of the case involving legal theories not presented;* * * * " (p. 558).*

An earlier decision by this Court recognized the same principle, *United States* v. *Rio Grande Irrigation Co.*, 184 U. S. 416, 423 (1902):

> "As upon this appeal in equity the whole case is before us, we can render such decree as under all the circumstances may be proper. *Ridings* v. *Johnson*, 128 U. S. 212, 218. If it appears that injustice may be done by proceeding to a final decree upon the record as it is presented to us, we have the power to forbear a determination of the merits and remand the cause for further preparation."

And most recently, in *U. S.* v. *Pierce Auto Freight Lines, Inc.*, 326 U. S. —, 66 S. Ct. 687 (March 11, 1946),

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* The rule of the *Hormel* case, *supra*, was followed in *Commissioner of Internal Revenue* v. *Wells*, 132 F. (2d) 405 (C. C. A. 6th, 1942), which arose on a motion by the Commissioner of Internal Revenue for reconsideration of a tax liability in veiw of a decision of the Supreme Court handed down after the opinion of the Board of Tax Appeals. The following quotation from the opinion of the court is appropriate:

> "Rules of practice and procedure are devised to promote the ends of justice, and in the less formal proceedings before administrative agencies, such rules do not require sacrifice of this principle, by refusal of an appellate court to give consideration to issues not raised below. * * * Where, on review of a decision of the Board, an issue raised is purely one of law requiring no new or amplified factual determination, * * * the fact that the issue was not raised in the petition to the Board is immaterial; *Black Motor Co.* v. *Commissioner of Internal Revenue*, 6 Cir., 125 F. (2d) 977; and where a decision of the Board has been handed down prior to a decision of the Supreme Court and the Government, on appeal, in the light of such decision, relies upon a statutory provision not previously presented, the case is remanded to enable the respondent to introduce additional evidence directed to the new issue. *Helvering* v. *Richter*, 312 U. S. 561, 61 S. Ct. 723, 85 L. Ed. 1043."

this Court sustained the view of the District Court that where the public interest was involved, it might consider issues not raised before the Interstate Commerce Commission. Mr. Justice RUTLEDGE stated:

> "In a strict view neither the appellees nor the court were entitled to raise these questions. For it was not at any time suggested to the Commission, as it might have been upon petition for rehearing, that the proceedings had been conducted on the theory that both applications would not be granted. It is highly questionable therefore whether the appellees have not waived this question. *But the District Court, in raising it, has said that it was acting in protection of the public interest and we pass therefore to consideration of the issue on its merits*" (p. 693).

See also *U. S.* v. *Shelby Iron Co.*, 273 U. S. 571, 579 (1927) and *Gulbenkian* v. *Gulbenkian*, 147 F. (2d) 173 (C. C. A. 2d, 1945).

In two recent cases this Court has declined to grant certiorari, although the opinion in the Circuit Court of Appeals rested on grounds not raised in the court below. *Wall* v. *Brim*, 138 F. (2d) 478 (C. C. A. 5th, 1943), cert. den. 324 U. S. 857 (1945); *U. S.* v. *Cushman*, 136 F. (2d) 815 (C. C. A. 9th, 1943); cert. den. 320 U. S. 786 (1943).

As to the intimations of petitioners that they had no opportunity to argue these points in the Circuit Court of Appeals: not only were these phases of the case covered on oral argument and in extensive supplemental briefs (App. II, 417-482, 487-9), but both petitioners argued all the points they now make in their petitions for reargument (R. 380-426). These petitions received full consideration, as the court's second opinion shows.

Clearly there was no error in the court's resting its decision upon the grounds stated, and the petitioners' request for certiorari on that basis is unjustified.

POINT IV.

Respondent W. R. Grace & Co. was entitled to seek review of the Board's orders, and no error can be predicated upon the Circuit Court's recognition of that right.

The question, again raised by Pan American, as to Grace's right to procure a review of the Board's orders was twice presented to the judges of the Circuit Court of Appeals—first by motion to dismiss the review for lack of jurisdiction, and again when the court considered the petition for review on the merits, and on each occasion was argued at great length.*

Further characterizations of Grace as a "mere stockholder", and arguments that the orders of the Board merely failed to compel action which Grace sought, add nothing to the prior unsuccessful attempts to demonstrate that Grace had no right to a review. Indeed, Pan American's claim that the Board "simply declined to exercise coercion against it [Panagra]" and that "the order had no effect whatever upon the corporation" (p. 46) merely rephrases its metaphysical argument that notwithstanding the Board's dismissal, Panagra's *rights* remained—although it cannot *exercise* those rights. This contention reduces itself to the absurdity that the Board's interpretations as to

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* The contention is so unsubstantial that we will not trouble the Court with lengthy arguments. The arguments of Grace on this point are set forth in its brief in opposition to the motion to dismiss, and also in its reply brief on the petition to review (App. II, 120-31; 316-18).

its own jurisdiction and its final dismissal of the proceeding, ending, as a practical matter, all possibility of the extension, are appealable by no one. This would be a shocking anachronism in the light of adjudications by this Court under similar statutes enforcing the right of persons to secure review when necessary to vindicate the public interest.

Applicable here is this Court's decision in the companion cases, *American Power & Light* v. *Securities and Exchange Commission* and *Securities and Exchange Commission* v. *Okin*, 325 U. S. 385, 65 S. Ct. 1254 (1945). It reaffirms the principle followed by the Circuit Court of Appeals in this case, that under proper circumstances a stockholder may challenge an administrative order involving his corporation. The circumstances there involved were described as those where his "economic interest is affected by an order affecting his company under circumstances which make it inequitable that he be bound by the action or inaction of the management" (p. 1256).

That Grace's economic interest is affected by the orders of the Board can be demonstrated beyond peradventure of doubt.* This is a case, if there ever was one, where the circumstances make it inequitable that Grace be bound by the inaction of the Panagra Board, when such inaction results from a wrong on the part of a stockholder whose interests are in conflict with those of Panagra. That stockholder is the same party which now opposes any judicial review of the Board's order.

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* See brief of Grace on motion to dismiss the review (App. II, 120 *et seq*).

Conclusion.

We respectfully submit that the petitions do not present any question which merits review, and that the decision of the Circuit Court of Appeals is well supported by established legal and equitable principles and by the paramount public interest. Those considerations also indicate that these petitions for writ of certiorari to review the interlocutory decision below should be denied.

Dated: June 7, 1946.

Respectfully submitted,

JOHN T. CAHILL,
Attorney for Respondent,
W. R. Grace & Co.

FRED J. KNAUER,
JOHN P. MOORE,
Of Counsel.

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APPENDIX A.

Partial List of Subjects Litigated in Hearings in Docket 779.

1. The position and actions of Grace for, and Pan American against, the extension of Panagra, up to the time of the hearing (R. 121-141; B. R. 1196-7, 1279-80, 1444-5, 2461-79, 3326-37).*

2. The failure of Pan American directors of Panagra to cooperate with the eventually successful efforts of the Grace directors to extend Panagra's route to La Paz, Bolivia (B. R. 1111-2, 1505-8, 2079-81, 2586-8, 3653-4).

3. The attempt by Pan American to extract from Panagra a huge payment to Pan American before consenting to an extension of the Panagra route from La Paz, Bolivia, to Cordoba, Argentina (B. R. 1509-10, 1520, 2081-3, 2174-5, 2510-11, 2584-6, 2597, 2602, 3543-44, 3599-3601, 3780-2).

4. The opposition of the Pan American directors of Panagra to the alteration of the Panagra route so as to serve the important city of Cali, in Colombia (incidentally making possible the substitution of modern land planes for outmoded flying boats with which Pan American wanted to saddle Panagra). This was because Pan American's substantial interest in Scadta, the then German managed airline in Colombia, would be adversely affected. The final acquiescence of the Pan American directors a year later only on condition that Panagra would not serve the cities of Medellin and Turbo, also served by Scadta (B. R. 1511-19, 1116-22, 1679-81, 1687-88, 2361-64, 2406-2417, 3002-3, 3546-9, 3571).

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* The record references to these subjects are only illustrative, not exhaustive. They refer only to the testimony, and do not include the hundreds of exhibits received on these subjects.

5. The attempt by Pan American to force Panagra and Grace to sign an agreement not to operate in the Caribbean (B. R. 2607-8, 1518, 3643).

6. The attempt by Pan American in the early years to induce the Post Office Department to cut down the number of United States mail trips by Panagra to Buenos Aires, in order that Pan American might itself be financed to fly to Buenos Aires via the east coast of South America (B. R. 3471-4, 1503-4).

7. The discussions between the Grace and Pan American directors of Panagra in the early years as to the choice of flight equipment for Panagra (B. R. 1107-8, 1123-33, 1220-40).

8. The successful fight of the Grace directors in the early years to prevent Pan American from controlling the radio operations of Panagra (B. R. 1190, 1204-9, 1388-90, 1538-9, 1665-6, 1821, 1840-1, 2370-86).

9. Pan American's counter-charges that W. R. Grace & Co.'s interest in Grace Line, and representation of Panagra in South America by the agencies of W. R. Grace & Co., were detrimental to Panagra (B. R. 992-1001, 1300-1, 2558-9, 3553, 3726-7).*

10. Charges by Pan American concerning the operations of Panagra over a long period of years with respect to the handling of traffic, and other matters (B. R. 1201-2, 1688-1702, 3097-8).

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* After most elaborate efforts to uncover something in a retaliatory attempt to show that Grace has supported interests in conflict with Panagra (searching through thousands of letters and documents in Panagra's files, bringing in an ex-employee of Grace, and resorting to all form of inquisitorial research), only the most trivial and inconsequential evidence on this point could be produced by Pan American's counsel.

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11. The unfair competitive advantage achieved by Pan American through rendering inadequate connecting service between Miami and the Canal Zone, upon which connection Panagra is dependent in its competition for United States-Buenos Aires traffic with Pan American's East Coast of South America service (B. R. 626, 1288-96, 1371-3, 1702-3, 1760-1, 2103, 3604-7).

12. The struggle as to whether Panagra should be managed as an independent entity (as it was), as urged by the Grace directors of Panagra, or as a subordinate part of the Pan American Airways "System", as urged by the Pan American directors (B. R. 1104, 1498-1501, 1684, 2524-9, 3649-50).

13. The related controversy over Pan American's continuous efforts to submerge distinctive publicity and advertising for Panagra, and to substitute Pan American Airways "System" publicity and advertising (B. R. 897-899, 1549-61, 1580-87, 1704, 2481, 2637).

APPENDIX B.

Additional Statutory Provisions

(Civil Aeronautics Act)

"DECLARATION OF POLICY

"Sec. 2. In the exercise and performance of its powers and duties under this Act, the Authority * shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

"(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

* * * * * * *

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

"(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;"

"COMPLAINTS TO AND INVESTIGATIONS BY THE AUTHORITY

"Filing of Complaints Authorized

"Sec. 1002. (a) Any person may file with the Authority a complaint in writing with respect to anything done or

* The name "Authority" was later changed to "Board".

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omitted to be done by any person in contravention of any provision of this Act, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Authority to investigate the matters complained of. Whenever the Authority is of the opinion that any complaint does not state facts which warrant an investigation or action on its part, it may dismiss such complaint without hearing.

"Investigations on Initiative of Authority

"(b) The Authority is empowered at any time to institute an investigation, on its own initiative, in any case and as to any matter or thing concerning which complaint is authorized to be made to or before the Authority by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Authority shall have the same power to proceed with any investigation instituted on its own motion as though it had been appealed to by complaint.

"Entry of Orders for Compliance With Act

"(c) If the Authority finds, after notice and hearing, in any investigation instituted upon complaint or upon its own initiative, that any person has failed to comply with any provision of this Act or any requirement established pursuant thereto, the Authority shall issue an appropriate order to compel such person to comply therewith."

"Power of Court

"Sec. 1006. (d) Upon transmittal of the petition to the Authority, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Authority. Upon good cause shown, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate: *Provided*, That no interlocutory relief may be granted except upon at least five days' notice to the Authority."